JUN 23 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 214

FIELD ENTERPRISES, INC.,
Appellant,

v.

STATE OF WASHINGTON

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

FIELD ENTERPRISES, INC., *Appellant*,
v.
STATE OF WASHINGTON
No.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

In compliance with Rule 13(2) of the Rules of the Supreme Court of the United States, appellant Field Enterprises, Inc. (hereinafter "Field") submits this statement to show that the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Washington in this action.

OPINIONS BELOW

The opinion of the Superior Court of the State of Washington for Thurston County is not officially reported; a copy is annexed hereto as Appendix A. The opinion of the Supreme Court of the State of Washington appears at 47 Wash.2d 852, 289 P.2d 1010 (1955) and a copy is annexed hereto as Appendix B.

JURISDICTION

Field, a Delaware corporation engaged throughout the United States in the door-to-door solicitation of interstate book sales, sued in the Superior Court of the State of Washington, pursuant to WASH. REV. CODE 82.32.180 (1951), to recover gross receipts taxes and fee assessed by the State for the privilege of doing business within Washington. The Superior Court granted judgment for Field but the Supreme Court of the State reversed, entering judgment on December 20, 1955; a copy of the judgment is annexed as Appendix C. Judgments of the Supreme Court of Washington are final on all parties, WASH. REV. CODE 2.04.220 (1951). Notice of appeal to this Court was filed in the Supreme Court of the State on March 3, 1956. Time for docketing the case was enlarged for a period of sixty days in addition to the time provided by Rule 13(1) of this Court by an order entered April 19, 1956, by the Washington Supreme Court.

The statute drawn in question on the ground of its being repugnant to the United States Constitution is WASH. REV. CODE 82.04.220, 82.04.240, 82.04.250, 82.04.430(6), 82.04.440, 6 Revised Code of Washington 5692-99 (1951) which begins:

> "**82.04.220 Business and Occupation Tax Imposed.** There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

Subsequent sections lay the tax on the privilege of manufacturing, WASH. REV. CODE 82.04.240 (1951) and the privilege of selling, WASH. REV. CODE 82.04.250 (1951), at the same rates, but exempt from the manufacturing tax

hose who pay the tax on sales, WASH. REV. CODE 82.04.440 (1951) (The full statutory provisions are lengthy; the pertinent text is set forth as Appendix D). As the Chief Justice of the Washington Supreme Court has certified, he decision of the highest court of the State of Washington sustained the validity of this statute as applied, against a claim of repugnancy to the Constitution, art. I, § 8, cl. 3. This Court, accordingly, has jurisdiction on appeal. 28 U.S.C. § 1257(2) (1952), *Railway Express Agency, Inc.* v. *Virginia*, 347 U. S. 359 (1954); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389 (1952); *Richfield Oil Corp.* v. *State Board of Eq.*, 329 U.S. 69 (1946); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921).

QUESTIONS PRESENTED

1. Is a gross receipts tax on the privilege of engaging in business within the State of Washington repugnant to U. S. CONST. art. I, § 8, cl. 3, when applied to a foreign corporation whose only activity within the State is the door-to-door solicitation of interstate business?

2. Is a State gross receipts tax laid on both the privilege of manufacturing and the privilege of selling within the State, but exempting from taxation as manufacturers those persons who pay the tax as sellers, repugnant to U.S. CONST. art. I, § 8, cl. 3, when applied to an out-of-state manufacturer, because it subjects that manufacturer to the risk of multiple taxation, while insuring that domestic manufacturers who sell locally pay but one tax?

These questions were raised before the Tax Commission of the State of Washington which rejected Field's position in a letter dated April 28, 1953 (Complaint and Notice of Appeal, p. 4). Both questions were raised by the

complaint (Complaint and Notice of Appeal, p. 4), put in issue by the answer (Answer, p. 1) and fully briefed and argued before the two courts below.

STATEMENT OF THE CASE

Field publishes two sets of children's books, *World Book Encyclopedia* and *Childcraft*. It is a Delaware corporation and has its offices in Chicago.

Door-to-door salesmen solicit orders for the books on behalf of Field throughout the United States. They are paid by Field on a commission basis. The salesman takes an order on a form marked "This non-cancellable order is subject to acceptance in Chicago." At the time the order is taken, the salesman obtains either a down payment or the entire purchase price. He then turns over the order and the payment to his division manager who maintains an office centrally located within the territory covered by the division. The division manager records the order and forwards order and money to the Field office in Chicago which passes on credit and which may either accept or reject the order. The ordered books are then sent directly to the customer from the bindery in either Indiana or Tennessee. The customer is billed for shipping cost, f.o.b. the bindery, by Chicago. Refunds and replacements are sent directly to the customer from Chicago and the customer has all necessary subsequent dealings directly with Chicago. All payments are made to Chicago.

The division manager for door-to-door salesmen working in Alaska, Idaho, Oregon and Washington leases in his own name an office in Seattle, Wash. He records and forwards orders, employs salesmen and gives them promotional material. The division manager has a district manager under him and four people in his office who do only bookkeeping and stenographic work. He maintains no in-

ventory, handles no advertising, does not pass on credit, solicits no orders for books, is powerless to accept orders, and has no customer contact whatsoever, except accidentally and infrequently when a determined customer happens to call. In this manner, about 10 orders are received annually. The division manager, like the door-to-door salesmen, is paid on a commission basis by checks drawn by Field in Chicago. He bears all the operating expenses of his office.

On April 28, 1953, the Tax Commission of the State of Washington ordered Field to register and to pay to Washington the Business Occupation Tax imposed by WASH. REV. CODE 82.04.220 (1951) for the privilege of doing business within the State. The tax was levied on the gross proceeds of Field's sales to customers in Washington from August 1, 1950 to April 30, 1953, which totaled $1,593,276.40. Field paid the tax of $4,089.35 (including a small surtax, see WASH. REV. CODE 82.04.295 (1951)) and a registration fee of $1. It then brought this action for refund. The action was tried on stipulated facts. In the trial court, Field prevailed, but the Supreme Court reversed.

THE FIRST QUESTION PRESENTED IS SUBSTANTIAL

The State of Washington here seeks to impose a privilege tax on the privilege of soliciting interstate business. This it may not do. *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359 (1954); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U.S. 389 (1952); *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951).

That the tax in issue is a privilege tax may scarcely be challenged. The statute itself characterizes the tax as one "for the act or privilege of engaging in business activities" WASH. REV. CODE 82.04.220 (1951). The Supreme Court of the State of Washington, both in the instant case and in

all others, has regularly quoted the statutory language and has never sought to characterize the tax as other than a privilege tax. E.g., *Field Enterprises, Inc.* v. *Washington,* 47 Wash.2d 852, 289 P.2d 1010 (1955); *Crown Zellerbach Corp.* v. *Washington,* 45 Wash.2d 749, 759, 278 P.2d 305, 311 (1954); *Bloxom* v. *Henneford,* 193 Wash. 540, 543, 544, 76 P.2d 586, 587, 588 (1938). And this Court has repeatedly termed this a privilege tax. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434, 435 (1939); *Puget Sound Stevedoring Co.* v. *Tax Comm'n,* 302 U.S. 90, 91, 94 (1937).

The facts here make it clear that the activity on which Washington seeks to impose this privilege tax is the solicitation of interstate business. Field's salesmen are nothing other than drummers, soliciting business on behalf of an enterprise located in a foreign state.

In a long line of cases, recently relied upon by this Court in *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U.S. 389, 392 & n. 7, 393 & nn. 8 & 11 (1952), this Court has held that the states may not lay privilege taxes on the activities of drummers who solicit interstate business.

Field's drummers are, of course, supervised by a division manager who covers three states and the Territory of Alaska and who maintains an office in Seattle. The Supreme Court of the State of Washington relied exclusively on this fact in upholding the tax, although it did not reject the trial court's finding that Field was engaged solely in interstate commerce nor did it reject the privilege characterization. But in many of the drummer cases relied on in *Memphis Steam Laundry* this Court held that the mere presence in the taxing state of an office supervising the solicitation of interstate business is not a sufficient basis for the imposition of a state privilege tax. *Real Silk Hosiery Mills* v. *Portland,* 268 U.S. 325 (1925); *Cheney*

Brothers Co. v. *Massachusetts*, 246 U.S. 147 (1918); cf. *International Textbook Co.* v. *Pigg*, 217 U.S. 91 (1910).

In other cases under the Commerce Clause, this Court has repeatedly rejected the argument that local incidents within a particular taxing state may justify the imposition of a tax on the privilege of engaging in interstate commerce. Thus, *Railway Express Agency, Inc.* v. *Virginia*, 347 U.S. 359 (1954), involved a gross receipts tax, characterized by the state legislature as a tax on the privilege of doing business within Virginia. Taxpayer was a foreign corporation whose activities within Virginia consisted of the pickup, delivery and through transportation of freight. Despite substantial local incidents—taxpayer had many employees in Virginia, maintained a fleet of trucks there and owned real estate and tangible personal property within the state with an assessed value of approximately $130,000, in addition to approximately $110,000 in cash—this Court invalidated the privilege tax because it was applied to an exclusively interstate business. Again, in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U.S. 602 (1951), this Court held unconstitutional the attempted application of a privilege tax to a foreign corporation which was engaged exclusively in interstate commerce but which maintained within the taxing state two freight terminals, a fleet of pickup trucks, a fleet of long-distance trucks and at least 27 full-time employees.

Both as a general matter, then, and specifically as to drummers, this Court has repeatedly made it clear that a tax laid on the privilege of engaging in interstate commerce may not stand. And the tax is not saved by the fact that a corporation engaging in the solicitation of interstate business happens to supervise the activities of its traveling solicitors by a local agent.

The Supreme Court of Washington ignored all of these authorities but two—*Spector* and *Memphis Steam Laundry*

—and it brushed these aside. Instead, it relied completely upon one of its own earlier decisions, *B.F. Goodrich Co.* v. *Washington,* 38 Wash.2d 663, 231 P.2d 325 (1951), *cert. denied,* 342 U.S. 876 (1951). *Goodrich,* in turn, relied upon *Norton Co.* v. *Dep't of Revenue,* 340 U.S. 534 (1951) and, like *Norton,* held no more than that, where intrastate and interstate commerce are inextricably mingled, the burden is on the taxpayer to establish what business is interstate and not subject to state taxation and what is intrastate and subject. In each of those cases, the Court held that the taxpayer had failed to bear that burden. But here there is no such issue. Field's business is all done by one technique: door-to-door solicitation. In no part of its business does it play the role of the hometown merchant. As the trial court concluded, in a finding left undisturbed by the Washington Supreme Court:

> "The business activity of the plaintiff [Field] within the State of Washington has at all times covered by this action been the solicitation of interstate business."

Hence, neither *Norton* nor *Goodrich* is here pertinent.

The Supreme Court of Washington has, then, we submit, erroneously deprived appellant of a substantial constitutional right. The significance of the decision is not, however, confined to this case. The weight of recent authority in the state courts supports Field's position on this appeal. E.g., *Liebold* v. *Brown,* 260 Ala. 354, 71 So.2d 7 (1954); *Gross Income Tax Div.* v. *Surface Combustion Corp.,* 232 Ind. 100, 111 N.E.2d 50, *cert. denied,* 346 U.S. 829 (1953); *Coleman* v. *Trunkline Gas Co.,* 218 Miss. 285, 63 So.2d 73, *cert. denied,* 346 U.S. 824 (1953); *Olan Mills, Inc.* v. *City of Cape Girardeau,* 364 Mo. 1089, 272 S.W.2d 244 (1954); *Matter of United Piece Dye Works,* 282 App. Div. 60, 121 N.Y.S.2d 683 (1st Dep't 1953), *aff'd without op.,* 307 N.Y.

780, 121 N.E.2d 617, (1954), *cert denied sub nom. Gerosa* v. *United Piece Dye Works,* 348 U.S. 916 (1955); *Virginia* v. *Olan Mills, Inc.,* 196 Va. 898, 86 S.E.2d 27 (1955). But a few state courts have taken the contrary view. E.g., *Ramsey* v. *Investors Diversified Services, Inc.,* 248 S.W.2d 263 (Ct. Civ. App. 1952) (not officially reported); *Ruppert* v. *Commissioner,* 117 Vt. 83, 85 A.2d 584 (1952); *County Board* v. *Arcade-Sunshine Co.,* 196 Va. 916, 86 S.E.2d 162 (1955). This lack of unanimity serves to underline the substantiality and emphasize the importance of the first question here presented.

THE SECOND QUESTION PRESENTED IS SUBSTANTIAL

The statute here in issue is most carefully drawn. In separate sub-sections, it levies taxes at the same rate on the privilege of manufacturing, WASH. REV. CODE 82.04.240 (1951), and the privilege of selling, WASH. REV. CODE 82.04.250 (1951). It then exempts from the tax upon manufacturing any person who is taxable as a seller, WASH. REV. CODE 82.04.440 (1951). Thus, the statute insures that any Washington manufacturer who sells to Washington customers shall pay but one tax. And it seeks to lay the same tax upon a Washington manufacturer who makes sales outside the state and upon a foreign manufacturer who sells within Washington.

The statute presents, in consequence, a face of fairness: everyone seems to pay one tax. But the face is false. Everyone pays only one tax *to Washington.* But any Washington manufacturer who sells to a customer in a state having a statute like Washington's will be taxed twice. The same is true of a foreign manufacturer who pays to his own state a tax for the privilege of manufacturing and is then met by a demand from Washington for a tax upon the privilege of selling.

Thus, the effect of this statute is to tax the intrastate businessman only once but to expose his interstate competitor to the risk of double taxes. And if this very statute is adopted by another state, the risk becomes certainty.

This is nothing other than planned discrimination against the interstate businessman and, as such, is repugnant to the Commerce Clause. This Court has often invalidated local gross receipts taxes upon a showing of risk that the state of the buyer and the state of the seller might, by different taxing techniques, impose upon interstate commerce multiple tax burdens not borne by local commerce. *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U.S. 434 (1939); *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307 (1938); *Fisher's Blend Station, Inc.* v. *State Tax Comm'n,* 297 U.S. 650 (1936), as explained in *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250, 260 (1938). Here, however, we have more than a possible, fortuitous multiplication of burdens. We have a taxing scheme carefully calculated to discriminate against interstate commerce. Such discrimination is forbidden, see *Memphis Steam Laundry Cleaner, Inc.* v. *Stone,* 342 U.S. 389 (1952) and cases cited at 394, n. 13.

Interstate commerce must pay its own way, provided that the fare is properly collected. It may not, however, deliberately be required to pay double fare.

The statutory scheme under which the State of Washington has here sought to tax Field is, then, invalid, whenever applied to foreign manufacturers who sell to customers within Washington or to Washington manufacturers who sell outside their state. The constitutional invalidity of a

taxing scheme with so broad a sweep is, we respectfully suggest, a matter of substance.

Respectfully submitted,

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June 26, 1956

APPENDIX A

IN THE

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR THURSTON COUNTY

FIELD ENTERPRISES, INC., *Plaintiff,* *vs.* STATE OF WASHINGTON, *Defendant.*	No. 27511 MEMORANDUM OPINION

Plaintiff seeks recovery of business and occupation taxes paid under the provisions of R. C. W. Chapter 82.04. This exaction is by its express terms "a tax for the act or privilege of engaging in business activities." Plaintiff asserts that all its operations in the State of Washington have at all times been in interstate commerce, which commerce the State is prohibited from taxing by reason of the Commerce Clause of the Federal Constitution. It has paid the use tax under the provisions of R. C. W. Chapter 82.12. This exaction is by its express terms upon the "using within this state as a consumer any article of tangible personal property - - -." The difference between the two sorts of taxes is referred to here for the reason that the distinction is fundamental to a correct appraisal of the precedents. It is well settled that the Commerce Clause is violated when a state imposes a tax upon the privilege of doing interstate business within that state.

Spector Motor Service, Inc. v. *O'Connor,* 95 L. Ed. 573

But the application of the rule presents the difficulty, and accordingly the problem is factual. The case has been presented upon an agreed statement of facts. We look to those facts for a determination of whether or not the state has in fact taxed the privilege of doing interstate business.

A summary of the portions of the agreed statement of facts essential to a determination follows. Reference thereto is made for further detail. Differing conclusions of the parties with respect to certain facts are omitted.

Plaintiff is a Delaware corporation with its principal office and place of business in Chicago, Illinois. It publishes and sells sets of books entitled World Book Encyclopedia and Childcraft. The general course of business is for its salesmen to approach prospective customers with samples and descriptive literature. These salesmen report to a Seattle office. Customers are solicited to sign orders and to make a down payment or payment in full. The orders recite: "This non-cancellable order is subject to acceptance in Chicago." Orders and payments received are delivered to the Seattle office. Data from the orders is abstracted in this office, and the orders and payments are then transmitted to the Chicago office. All payments other than the initial payments are made directly to the Chicago office.

All stocks of books are maintained outside the State of Washington. Shipment pursuant to an order is made directly therefrom to the customer in the State of Washington. Shipments are made f.o.b. the point of shipment and transportation charges are prepaid and billed to the customer. Credit investigation, other than the information appearing on the order, is made by or at the instigation of the Chicago office.

The Seattle office staff consists of a division manager, and four employees who do bookkeeping and stenographic work. The division manager is compensated by commis-

sions, and the four employees are paid directly by the Chicago office. The Chicago office pays certain expense of maintaining the Seattle office, and certain other expense of that office is paid by the division manager.

The Seattle office does the sales training and promotional instruction among the salesmen reporting to it. The Chicago office handles all advertising through a national advertising firm. Occasionally temporary displays of the books are set up in two department stores in the State of Washington, and orders are received there by salesmen in conformity with the practice heretofore described. The Seattle office does not repossess or repair books. All inquiries made to it concerning the return or replacement of books are referred to the Chicago office.

In summarizing the facts we have denominated the writing presented by the salesman and signed by the customer as an "order." This term was used only for convenience of expression, and we must now examine the nature of the dealings between plaintiff and its customers. Where a writing of this sort is subject to acceptance, the courts have held that no binding undertaking is effected unless there be acceptance in accordance with the terms of the writing, or acceptance by delivery of the goods, or acts of the parties tantamount to acceptance.

Pillsbury Flour Mills v. *Independent Bakery,* 165 Wash. 360

and cases there cited. Nor did the inclusion of the term "non-cancellable" operate to create a binding undertaking prior to acceptance.

Lowenthal Company v. *McCormack Brothers Co.,* 144 Wash. 229

Under the facts in the case at bar, the so-called orders were proposals subject to acceptance in Chicago, and when so accepted contracts of sale were consummated in Illinois.

The Tax Commission felt bound by the decision in B. F. Goodrich Co. v. State, 38 Wash. (2d) 663, decided May 15, 1951. The Supreme Court considered the Goodrich case controlled by the decision of the Supreme Court of the United States in Norton Company v. Department of Revenue, 95 L. Ed. 517, decided February 26, 1951. Our Supreme Court said in the Goodrich case (p. 676): "It scarcely needs to be said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of that court no matter what our private views may be." It referred to the later case of Spector Motor Service, Inc. v. O'Connor, 95 L. Ed. 573, decided March 26, 1951, which it found inapposite, and repeated its adherence to the Norton case.

On March 3, 1952 the Supreme Court of the United States decided the case of Memphis Steam Laundry Cleaner, Inc. v. Stone, 96 L. Ed. 436. There was in question a Mississippi tax upon persons soliciting business for laundries not licensed in the state. The tax was a privilege tax. The concern sought to be taxed operated a laundry and cleaning establishment in Memphis, Tennessee. It sent ten of its trucks into eight Mississippi counties where its drivers picked up, delivered and collected for laundry and cleaning and sought to acquire new customers. The court held the tax violated the Commerce Clause and said (p. 439): "In the long line of "drummer" cases, beginning with Robbins v. Shelby County Taxing Dist., 12 U.S. 489, 30 L. Ed. 694, 7 S Ct 592 (1887), this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself."

Appendix A

In the last analysis the business activities of plaintif within the State of Washington are the solicitation of inter state business, and the Memphis decision controls.

Two still later decisions of the Supreme Court of th United States (Michigan-Wisconsin Pipe Line Co. v. Ca vert, 98 L. Ed. (Adv.) 342, decided February 8, 1954, an Railway Express Agency v. Virginia, 98 L. Ed. (Adv. 48 decided April 5, 1954) involve the attempted applicatio of a state privilege tax to interstate business but their fact are not apposite to those of the case at bar.

The plaintiff will prevail.

/s/ RAYMOND W. CLIFFORD
Judge

June 7, 1954.

APPENDIX B

IN THE

SUPREME COURT OF THE STATE OF WASHINGTON

FIELD ENTERPRISES, INC., *Respondent,* v. STATE OF WASHINGTON, *Appellant.*	No. 33120 EN BANC Filed November 17, 1955

Plaintiff, a Delaware corporation with its principal place of business in Chicago, Illinois, maintains this action to recover $4,089.35 business and occupation taxes paid by it, under protest, to the state of Washington. The taxpayer's return covered the period from August 1, 1950, through April 30, 1953, and reported retail sales in the state of Washington, during this period, of $1,593,276.40, all of which sales were made as hereinafter set forth.

The tax was levied pursuant to RCW 82.04.220 which provides:

> "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

Appendix B

In computing the tax, the statute provides that there may be deducted from the measure of tax

> "(6) Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States." RCW 82.04.430.

The trial court held the imposition of this tax violated the commerce clause (Art. I, § 8 (3)) of the United States Constitution. It entered judgment against the defendant for the amount of the taxes paid with interest from the date of payment, together with statutory costs. Defendant appeals.

The taxpayer publishes two sets of books, the *World Book Encyclopedia* and *Childcraft*. It maintains division offices throughout the United States, each of which supervises its activities within defined geographic areas. Its activities in Alaska, Idaho, Oregon, and Washington are carried on through a department or division known as the Educational Division, with offices in Seattle. This division is, in turn, divided into eight separate districts, three of which are located in this state.

The Seattle division office consists of a suite used by its division manager, the Seattle district manager, and four employees of the taxpayer who do bookkeeping and stenographic work. The lease is in the name of the division manager; he pays the rent and utilities from his own funds. Each main entrance door bears only the taxpayer's name as publisher of the books mentioned. The office contains an instruction room of sufficient size to accommodate twenty-five to thirty persons. It is used for new solicitors' instruction classes, salesmen's promotional meetings, and

displaying advertising material relative to taxpayer's publications. The office furniture and machines are furnished and owned by the taxpayer which makes replacements and repairs and pays personal property taxes.

At approximately biweekly intervals, the Seattle division office sends out two separate instructional and promotional newsletters to the salesmen.

All advertising is handled by the taxpayer's Chicago office through a national advertising agency. However, the division or district managers frequently exhibit the books at teachers' institutes and other similar conferences. Five or six sets of the books are in teacher-training schools in the state, replacements being made directly by the Chicago office. At irregular intervals, sets of books are displayed in two department stores in the state. A salesman attends the display, answers inquiries, and takes orders on the taxpayer's usual forms. On one occasion, the division manager arranged to give the encyclopedia as a prize to the team of school children winning a quiz-contest program, broadcast weekly by a Seattle radio station.

Salesmen are employed by either the division or district managers. They are frequently employed through want ads in local newspapers, but are usually employed by direct contact or through local school and educational channels. There are approximately four hundred and ten salesmen working under the supervision of the Seattle office. Approximately one hundred and seventy-five of them are residents of the state of Washington; thirty work full time.

Orders for approximately ten sets of books per year are taken directly at the Seattle office, but only when a prospective customer happens to call at the office. The employees of that office do not solicit orders.

Appendix B

Orders for books are obtained through personal calls by salesmen. When a prospective purchaser indicates a desire to purchase, an appropriate order form is filled out by the salesman and signed by the prospective purchaser. The form states

> "This non-cancellable order is subject to acceptance in Chicago."

The down payment or payment in full is collected at the time the order is signed. The order and payment are delivered to the Seattle office.

Data of an undisclosed nature is abstracted, compiled, and retained by the Seattle office. The order and remittances are forwarded to the Chicago office. On occasions, the Chicago office may request either the Seattle office or a particular salesman to secure a credit investigation. This is made by outside agencies and transmitted to Chicago for analysis and decision. If an order is not accepted, the down payment is returned to the purchaser by the Chicago office.

All stocks of books, except display and sample sets, are maintained outside the state of Washington. Shipment, pursuant to order or contract, is made directly therefrom to the customer, f.o.b. the point of shipment. Transportation charges are prepaid and billed to the customer as provided in the order. All payments, except the initial payment, are made by the purchaser directly to the taxpayer's Chicago office. Inquiries, concerning the return of books or replacements, are referred to the Chicago office. The Seattle office does not repossess or repair books.

All earnings of the manager and salesmen are computed on a commission basis. The commission payable to the division manager is computed to include reimbursement for office expenses paid with his personal funds.

Appendix B

We have set forth the agreed facts of this case at some length, because it is our considered opinion that the answer to the question raised is to be found in the recent unanimous *En Banc* decision of this court in *B. F. Goodrich Co.* v. *State,* 38 Wn. (2d) 663, 664, 231 P. (2d) 325, cert. den. 342 U. S. 876 (1951).

The facts of the *Goodrich* case, as they appear in the opinion, are these:

> "It engages in no manufacturing within this state, but its local selling activities are numerous and varied. Those sales, the gross receipts from which, appellant urges, have been improperly included within the measure of its business and occupation tax, may be divided into five general classifications, as follows:
>
> "Class A sales: These are sales by appellant's Automotive, Aviation, and Government Sales Division, which sells products to manufacturers, not for consumption, but for incorporation into articles manufactured by the purchasers, for example, fuel tanks for aircraft. This division maintains in Washington an office, a manager, and a secretary. The division manager solicits orders from Washington purchasers. These orders are received and acknowledged by him, and forwarded to appellant's main office at Akron, Ohio. Final acknowledgment and approval is made at Akron and transmitted to the Washington division office which, in turn, notifies the customer. The merchandise is shipped directly to the purchaser, f.o.b. Akron."

Thus, it is apparent that the general scheme of the taxpayer's operations in this state are the same. Instead of one manager within the state, the taxpayer in the instant

case has a division manager and three district managers; instead of one secretary, there are four office employees; instead of one salesman (the manager), there are one hundred seventy-five of them within the state. Orders solicited are received in the Washington office and forwarded to the main office out of state. In both cases, the merchandise is shipped directly to the purchaser from out of state. In the instant case, it cannot be denied that the services rendered by the taxpayer's Seattle office are decisive factors in establishing and holding the market in this state for its publications.

Under similar circumstances, this court held that the business and occupation tax statute (the one we are considering here) did not effect an unconstitutional levy upon interstate commerce.

We do not agree with the argument that the *Goodrich* case can be distinguished, because the company had various business activities which this court treated as "an integrated whole." Just the reverse is true. The court carefully catalogued the various business activities and held some taxable under the statute and some not taxable. The fact that the taxpayer's *modus operandi* in this state parallels only one of the various business activities of the B. F. Goodrich Company, discussed in our former opinion, does not make the rules of law announced therein inapplicable.

The trial court based its decision on *Spector Motor Service, Inc.* v. *O'Connor,* 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951) and *Memphis Steam Laundry Cleaners, Inc.* v. *Stone,* 342 U. S. 389, 96 L. Ed. 436, 72 S. Ct. 424 (1952). In *B. F. Goodrich Co.* v. *State, supra,* this court pointed out that the *Spector* case, *supra,* was not applicable to such facts as we now have before us. The *Memphis* case,

supra, is also distinguishable. Mississippi levied a tax of fifty dollars per truck on a Tennessee laundry which sent its trucks into Mississippi to pick up and deliver laundry and solicit customers. Neither in fact nor in principle can the case control the one now before us.

The judgment is reversed.

WEAVER, J.

We concur:

Hamley, C. J.

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Mallery, J.

.....

Schwellenbach, J

.....

Hill, J.

.....

Donworth, J.

.....

Finley, J.

.....

Rosellini, J.

.....

Ott, J.

.....

APPENDIX C

IN THE

SUPREME COURT OF THE STATE OF WASHINGTON

FIELD ENTERPRISES, INC., Respondent, *vs.* STATE OF WASHINGTON, Appellant.	TUESDAY, DECEMBER 20, 1955 JUDGMENT No. 33120 Thurston County No. 27511

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 20th day of December, A. D. 1955, on motion of Don Eastvold, Attorney General, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby reversed with costs; and that the said State of Washington have and recover of and from the said Field Enterprises, Inc. the cost of this action taxed and allowed at Two hundred ninety-seven and 51/100 ($297.51) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Of record in Office of the Clerk
of the Superior Court
Journal 41 at page 396

IN THE

SUPREME COURT OF THE STATE OF WASHINGTON

FIELD ENTERPRISES, INC., *Respondent,* *vs.* STATE OF WASHINGTON, *Appellant.*	No. 32120

STATE OF WASHINGTON, }
COUNTY OF THURSTON, } ss.:

I, BENJ. T. HART, Clerk of the Supreme Court of the State of Washington, do hereby certify that the attached and foregoing is a full, true and correct copy of the JUDGMENT and the whole thereof, as the same was entered in the above-entitled case on the 20th day of December, 1955, and now appears of record in my office in Journal 41 at page 396.

SEAL OF THE SUPREME COURT STATE OF WASHINGTON

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 10th day of January, 1956

/s/ Benj. T. Hart

BENJ. T. HART,
Clerk of the Supreme Court, State of Washington

APPENDIX D

THE STATUTE

82.04.220 Business and occupation tax imposed. There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be.

* * *

82.04.240 Tax on manufacturers. Upon every person except persons taxable under subsection (2) of RCW 82.04.260* engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products, including byproducts, manufactured, multiplied by the rate of one-quarter of one percent.

The measure of the tax is the value of the products, including byproducts, so manufactured, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

82.04.250 Tax on retailers. Upon every person engaging within this state in the business of making sales at retail; as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of one-quarter of one percent.

* * *

82.04.430 Deductions enumerated. In computing tax there may be deducted from the measure of tax the following items:

* * *

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*This subsection deals with the manufacture of flour.

(6) Amounts derived from business which the state is prohibited from taxing under the Constitution of this state or the Constitution or laws of the United States;

* * *

82.04.440 Persons taxable on multiple activities. Every person engaged in activities which are within the purview of the provisions of two or more of sections RCW 82.04.230 to 82.04.290, inclusive, shall be taxable under each paragraph applicable to the activities engaged in: **Provided,** that persons taxable under RCW 82.04.250 or 82.04.270 shall not be taxable under RCW 82.04.230, 82.04.240, or subsection (2) of RCW 82.04.260 with respect to extracting or manufacturing of the products sold, and that persons taxable under RCW 82.04.240 shall not be taxable under RCW 82.04.230 with respect to extracting the ingredients of the products so manufactured.

No. 214. FIELD ENTERPRISES, INC., *v.* WASHINGTON. Appeal from the Supreme Court of Washington. *Per Curiam:* The judgment is affirmed. *Norton Company* v. *Department of Revenue of Illinois*, 340 U. S. 534. MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN are of the opinion that probable jurisdiction should be noted. *Simon H. Rifkind* for appellant. Reported below: 47 Wash. 2d 852, 289 P. 2d 1010.